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Supreme Court, U.S.
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No. 00-1286

In The

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

GARRY V. GIDDENS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Missouri

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether KCS's claim that it was entitled to a set-off of Railroad Retirement disability payments is properly before the Court when it was not presented to or decided by the Missouri Supreme Court.

Whether the holding of *Eichel v. New York Central R. Co.*, 375 U.S 253 (1963), that Railroad Retirement disability payments may not be set-off against an award of damages in an FELA case, a matter of statutory construction of the FELA and the Railroad Retirement Act, should be disturbed when Congress has not amended either statute to provide for such a set-off and *Eichel* and the authorities upon which it relied properly construed these statutes.

Whether the Missouri courts below erred in excluding evidence of Railroad Retirement disability payments received by plaintiff under the standard established by *Eichel*, and followed by Missouri caselaw, of determining whether the probative value of the evidence of disability payments is outweighed by the danger of prejudicial effect on the jury.

2. Whether KCS's Due Process and Equal Protection Claims under the U.S. Constitution are properly before the Court when the Missouri Supreme Court rejected those claims on the basis of an independent and adequate state ground of decision.

Whether the damage instruction and verdict form used in this case, modeled on Missouri Approved Instructions, violated federal statutory or constitutional law,

QUESTIONS PRESENTED – Continued

under the FELA, the Due Process Clauses of the Fifth and Fourteenth Amendments, the Equal Protection Clause of the Fourteenth Amendment or the Supremacy Clause, when they provided for the *jury*, rather than the judge, to reduce damages in an FELA in proportion to contributory negligence, in accordance with the plain language of 45 U.S.C. § 53, and when the damage instruction and verdict form KCS claims should have been given require the judge, rather than the jury, to reduce the damages, contrary to 45 U.S.C. § 53.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Garry V. Giddens (hereinafter "Giddens" or "plaintiff"), respectfully requests that the Court deny the Petition for a Writ of Certiorari filed herein by Petitioner Kansas City Southern Railway Company (hereinafter "KCS" or "defendant").

OPINIONS BELOW

The opinion of the Missouri Supreme Court, en banc, in this case is reported at 29 S.W.3d 813. It is reproduced in the Petition, in Appendix A to the Petition. Because the opinion of the Missouri Supreme Court ruled one of the issues in part on the basis of the law of the case, the opinion in the prior appeal, *Giddens v. Kansas City Southern Railway Co.*, 937 S.W.3d 300 (Mo.App.1996) (*"Giddens I"*), is reproduced in the Appendix to this Brief For Respondent In Opposition to Petition for Writ of Certiorari.

JURISDICTIONAL STATEMENT

KCS invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). As will be set forth below, plaintiff Giddens submits that this Court is without jurisdiction of certain of the questions KCS seeks to present because the judgment of the Missouri Supreme Court on these points rests upon an independent and adequate state ground of decision. Plaintiff agrees that the Petition was filed within ninety (90) days of the denial of KCS's Motion for Rehearing in the Missouri Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to those provisions mentioned in the Petition, plaintiff Giddens submits that the Petition herein also involves the provisions of Section 3 of the Federal Employers' Liability Act (FELA), 45 U.S.C. § 53, which provides that contributory negligence will not bar recovery in an FELA case but that "***the damages shall be diminished by the jury*** in proportion to the amount of negligence attributable" to the employee. (emphasis supplied). It also involves Section 5 of the FELA, 45 U.S.C. § 55, which defines and limits the set-offs which may be allowed in an FELA case. The full text of these statutory provisions is set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner KCS has filed a Petition for Writ of Certiorari seeking review of the decision of the Missouri Supreme Court, en banc, affirming a judgment in favor of Respondent Garry V. Giddens, in an action under the FELA, 45 U.S.C. § 51, et seq., for severe personal injuries sustained by plaintiff during the course of his employment by KCS. Plaintiff was 44 years of age at the time of the most recent trial, and is now 47. He has only a 12th grade education. Prior to his injury in May, 1989, he had worked for KCS since April, 1973, and was a working foreman at the time of his injury. This was the third time this case has been tried to a jury. In each of the three trials the jury has returned a verdict in favor of plaintiff Giddens and against KCS on liability. The trial court ordered a new trial after the first verdict in favor of plaintiff in the sum of $500,000, due to failure to give a mitigation of damages instruction requested by KCS. Upon retrial, the

jury returned a verdict in favor of plaintiff in the sum of $1,400,000. The trial court granted KCS's motion for new trial, based upon alleged impropriety in plaintiff's jury argument, and the trial court's opinion that it had erred in excluding evidence of Railroad Retirement disability payments received by plaintiff. The Missouri Court of Appeals affirmed the order granting KCS a new trial, refusing to disturb the trial court's discretionary finding that parts of plaintiff's jury argument had been improper. *Giddens I*, 937 S.W.2d 300 (Mo.App.1996). In *Giddens I*, the Court of Appeals also held that the trial court had erred in granting a new trial based upon its refusal to admit the evidence offered by KCS of Railroad Retirement disability payments, holding the trial court had properly excluded that evidence in the first instance. Plaintiff's application for transfer to the Missouri Supreme Court, opposed by KCS, was denied. Upon retrial, the jury returned a unanimous verdict in favor of Plaintiff in the amount of $1,520,000. A panel of the Missouri Court of Appeals, Western District, affirmed the judgment. The Missouri Supreme Court granted KCS's application to transfer the case to the Missouri Supreme Court. The record and briefs filed in the Court of Appeals were also the record and briefs before the Supreme Court, which then resolved the case "as if on original appeal." Rule 83.09, Missouri Rules of Civil Procedure. The Missouri Supreme Court affirmed the judgment of the trial court. *Giddens v. Kansas City Southern Railway Co.*, 29 S.W.3d 813 (Mo. banc 2000). KCS has now filed its Petition for Writ of Certiorari seeking review of that decision.

ARGUMENT

I.

KCS's Claim That It Should Have Been Allowed A Set-Off Based On Railroad Retirement Disability Payments Is Not Properly Before This Court Because It Was Not Presented To Or Decided By The Missouri Supreme Court, And Is Without Merit In Any Event. In Excluding Evidence Of Such Disability Payments, The Missouri Courts Properly Applied The Same Standard KCS Urges This Court To Adopt, That Of Weighing Probative Value Against Prejudicial Effect. No Error Has Been Shown.

As part of its first Question Presented, KCS asks this Court to grant a writ of certiorari to consider whether KCS should have been granted a set-off of Railroad Retirement disability payments against the award of damages in this case. KCS argues in this Court that it should receive a set-off of $223,667. This is the amount of the Railroad Retirement disability payments received by plaintiff in the past and the present value of the amount of Railroad Retirement disability payments KCS projects plaintiff will receive in the future that KCS deems attributable to its payments to the Railroad Retirement system.

However, this Court is without jurisdiction to consider this question because it was not presented or decided on appeal in the court below. KCS's claims of error on appeal, as set forth in its Points Relied On in its appellate brief in the courts below, did not include any claim that the trial court erred by not setting off the damage award by Railroad Retirement disability payments, as it now urges in this Court. The Missouri Court of Appeals, and the Missouri Supreme Court after transfer, thus did not consider or decide any such claim of

alleged error. Nor was such a claim of alleged error raised or decided in *Giddens I.*

To confer jurisdiction upon this Court, the issue must have been presented in such a manner that it was necessarily decided by the Missouri Supreme Court. "[W]hen, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary." *Street v. New York*, 394 U.S. 580, 582 (1969). *See also Webb v. Webb*, 451 U.S 493 (1981); *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S 71 (1988); *Adams v. Robertson*, 520 U.S. 83 (1997). No such showing can be made by KCS in this case, because the claim was simply not raised on appeal in the Missouri courts.

Additionally, review of this Court's decision in *Eichel v. New York Central R. Co.*, 375 U.S. 253 (1963), and the authorities relied upon by *Eichel*, make it clear that as a matter of substance the petition for writ of certiorari should not be granted on this issue. The *Eichel* opinion could not state more clearly that Railroad Retirement disability payments may not be used to offset or mitigate damages. 375 U.S at 255. In so stating, this Court relied upon and cited with approval the opinion of the First Circuit in *New York, N.H. & H.R. Co. v. Leary*, 204 F.2d 461 (1st Cir.), *cert. denied*, 346 U.S. 856 (1953) *Leary's* holding, that Railroad Retirement disability benefits may not be used to offset or mitigate damages, was based upon statutory construction of Section 5 of the FELA, 45 U.S.C. § 55, along with the Railroad Retirement Act.

45 U.S.C § 55 very specifically defines and limits the set-offs that may be claimed by a defendant railroad in an FELA action. It provides (emphasis supplied):

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: ***Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.**

The enumeration of these specific items which may be set off in an FELA case implies the exclusion of any other permissible set-offs. The structure of § 55 also clearly indicates that no set-offs other than those enumerated are permissible in FELA cases, because the set-offs provided for in § 55 are listed only in a proviso to the general provision of the statute that all devices exempting a railroad from liability under the FELA are void. The holding of *Leary*, adopted by this Court in *Eichel*, was that Railroad Retirement disability payments were not among the set-offs that could lawfully be taken in an FELA case within the meaning of § 55, and therefore no set-off was permissible. The *Leary* court reasoned as follows:

> Under § 55 of the Federal Employers' Liability Act, 45 U.S.C.A. § 55, the defendant's right of set-off for certain contributions to employee disability payments is limited to amounts paid "on account of the injury or death for which said action was brought." The Railroad Retirement Act of 1937, 45 U.S.C.A. § 228a et seq. authorizes disability payments only for employees who have reached sixty years of age or have completed thirty years of service. We think these age and service requirements for

> disability payments remove these payments from the coverage of § 55 of the Federal Employers' Liability Act. Accident indemnity strictly speaking does not seem to be within the Congressional intent disclosed in the Retirement Act of 1937. *Hetrick v. Reading Co.*, D.C.N.J.1941, 39 F.Supp. 22. Thus, this is not a set-off authorized by § 55 because we think the retirement fund is not an "insurance, relief benefit, or indemnity" within the meaning of that section. The Railroad Retirement Act is substantially a Social Security Act for employees of common carriers. The retirement fund is supported by tax collections from the employer and employee, 26 U.S.C. §§ 1500, 1520, and to a limited extent by the general public, 45 U.S.C.A. §§ 228c, 228o, 228p. The benefits received under such a system of social legislation are not directly attributable to the contributions of the employer, so they cannot be considered in mitigation of the damages caused by the employer. See *McCarthy v. Palmer*, 2 Cir., 1940, 113 F.2d 721, certiorari denied, 1940, 311 U.S. 680, 61 S.Ct. 50, 85 L.Ed. 438.

New York, N.H. & H.R. Co. v. Leary, 204 F.2d 461, 467-68 (1st Cir.), *cert. denied*, 346 U.S. 856 (1953). It has been more than 37 years since this Court adopted this construction of § 55 and the Railroad Retirement Act. It is a construction that follows readily from the plain language used by Congress in these statutes. Congress has not amended either § 55 or the Railroad Retirement Act to allow railroad defendants to set-off Railroad Retirement disability payments in FELA actions. KCS cites no case that has held that such a set-off should be allowed. There is no conflict among the federal or state courts on this point. If Congress wished to allows such a set-off in the face of this settled statutory construction, it could have amended either § 55 or the Railroad Retirement Act to do so. It has

chosen not to so amend either statute. "[C]onsiderations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois*, 431 U.S. 736 (1977). There is a "presumption of adherence" to this Court's prior decisions "concerning legislative enactments." *Id.* at 736-37. There is no reason for the Court to re-examine this issue of statutory construction. The writ should be denied.

In the remainder of its first Question Presented, KCS asks this Court to review whether the trial court properly sustained plaintiff's objections to admission of evidence of the Railroad Retirement disability payments received by plaintiff, when offered by KCS to prove that such payments gave him a disincentive to mitigate his earnings loss by finding employment because his earnings might decrease his railroad retirement disability benefit. KCS claims that there is a split between the circuits and state supreme courts as to whether "there should be a *per se* rule excluding receipt of such evidence or whether such ruling should be left to trial court discretion as are other evidentiary matters under Rule 403, Federal Rules of Evidence and state rules of evidence." Petition at 8. Rule 403 of the Federal Rules of Evidence provides for the exclusion of evidence, even if logically relevant, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." It is most respectfully submitted that the "conflict" KCS asks this Court to resolve is not presented by this case and is, in any event, for the most part non-existent.

The Missouri Supreme Court addressed the merits of this issue in part, stating that "as a general rule" evidence

of Railroad Retirement disability payments is not admissible in an FELA case "because its probative value is outweighed by the potential prejudicial effect on the jury," and relying on *Eichel*. 29 S.W.3d at 824, Petition at 18a. It thus did not regard *Eichel* as establishing a *per se* rule of inadmissibility. It did not address the argument that the "door had been opened" to the admission of such evidence, based upon the rule of the law of the case (29 S.W.3d at 824-825; Petition at 18a), since the issue of the admissibility of the disability payments on this basis had been resolved against KCS in *Giddens I*. The evidence submitted by KCS to the trial court on retrial in support of admission of disability payments, leading to the judgment now before the Court, was identical to that in *Giddens I*, because it consisted of reading portions of the record from *Giddens I* and depositions previously read during the earlier trial. *Giddens I* thus contains a fuller explanation of the exclusion of the disability payments in this case, and is reproduced in the Appendix to this Brief. *Giddens I*, and the cases upon which it relied, did not establish a *per se* rule of exclusion either. They recognize that there may be circumstances under which such evidence should be admitted because the probative value of disability payments outweighs the prejudicial effect in those cases. *See, e.g., Moore v. Missouri Pacific R. Co.*, 825 S.W.2d 839, 842-43 (Mo. banc 1992) (affirming admission of Railroad Retirement disability payments in an FELA case).

This Court's decision in *Eichel* did not establish a *per se* rule of exclusion of Railroad Retirement disability payments. Indeed, although *Eichel* was decided before Rule 403 was adopted, *Eichel* analyzed the issue in terms

weighing probative value against prejudicial effect. Evidence of the monthly Railroad Retirement disability payments was offered for "the purpose of impeaching the testimony of petitioner as to his motive for not returning to work and as to the permanency of his injuries," 375 U.S. at 354, and to "show a motive for (petitioner's) not returning work and for his deciding not to go back to work after the last accident." 375 U.S. at 255-56. The district court sustained an objection to this evidence but the Court of Appeals reversed, holding the probative value of the disability payments was not outweighed by the "danger of undue prejudice through being considered by the jury for the incompetent purpose of a set-off against lost earnings." 375 U.S. at 255. In reversing the Court of Appeals, in effect approving the district court's action in excluding the payments, this Court weighed probative value against prejudicial effect and held:

> We disagree. In our view the likelihood of misuse by the jury clearly outweighs the value of this evidence. Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension. Moreover, it would violate the spirit of the federal statutes if the receipt of disability benefits under the Railroad Retirement Act of 1937, 50 Stat. 309, as amended, 45 U.S.C. § 228b(a) 4, were considered as evidence of malingering by an employee asserting a claim under the Federal Employers' Liability Act. We have recently had occasion to be reminded that evidence of collateral benefits is readily subject to misuse by a jury. *Tipton v. Socony Mobil Oil Co., Inc.*, 375 U.S. 34, 84 S.Ct. 1. It has long been recognized that evidence showing that the defendant is insured creates a substantial likelihood of misuse. Similarly, we must

> recognize that the petitioner's receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact.

Eichel, 375 U.S. at 255 (footnotes omitted).

Contrary to KCS's argument, *Eichel's* holding that Railroad Retirement disability payments could not be set-off from the damages in an FELA case was not dicta. It was a necessary predicate to the evidentiary holding that the probative value of the evidence was outweighed by its prejudicial effect. *Green v. Denver & Rio Grand Western R. Co.*, 59 F.3d 1029, 1033 (10th Cir.), *cert. denied*, 516 U.S. 1009 (1995). Part of the prejudicial effect recognized in *Eichel* was the substantial likelihood of misuse of evidence of disability payments as a set-off of damages for lost earnings. The admission of such evidence may also improperly influence the jury's consideration of liability issues. *Green*, 59 F.3d at 1033-34.

Eichel gave the lower courts very specific and direct guidance about how probative value should be weighed against prejudicial effect in the normal FELA case. It clearly states that in the normal case in which the issue arises, the probative value of disability payments will most likely be outweighed by its prejudicial effect, when offered as evidence of malingering or to establish a motive for not working. The lower courts have followed the guidance given by *Eichel*, and have generally excluded evidence of Railroad Retirement disability payments.

The lower courts, however, including Missouri courts and specifically the Court of Appeals in *Giddens I*, have also recognized exceptions to the general guidance given by *Eichel* about how the probative value of disability payments should be weighed against prejudicial effect. One established exception is when the issue of the plaintiff's financial status is injected into the case in such a

way as to suggest financial distress. *See Moore v. Missouri Pacific R. Co.*, 825 S.W.2d 839, 842-43 (Mo. banc 1992); *Gladden v. P. Henderson & Co.*, 385 F.2d 480 (3rd Cir. 1967), *cert. denied*, 390 U.S. 1013 (1968); *Lange v. Missouri Pacific R.R. Co.*, 703 F.2d 322 (8th Cir. 1983). In such a case, the court may properly conclude that the probative value of the evidence of disability payments is *not* outweighed by its prejudicial effect, and may allow admission of that evidence. Thus, if a plaintiff simply makes a claim for wage loss due to his injury, and presents evidence of his efforts, if any, to mitigate his wage loss, application of *Eichel* will generally result in the conclusion that disability payments should not be admitted because the probative value is outweighed by prejudicial effect. But if a plaintiff receiving Railroad Retirement disability payments goes beyond that, injecting his financial status into the case in such a way as to suggest financial distress, the railroad is entitled to rebut that suggestion by showing the monthly disability payments. In *Giddens I*, the Court of Appeals actually expanded this exception to the guidance given by *Eichel*, stating that it was not limited to cases in which the issue of financial distress is injected into the case by plaintiff's own testimony, but also included cases in which the issue was injected by another witness. *Giddens I*, 937 S.W.2d at 304-305, App. 8-9.

In this case, KCS contends that the testimony of plaintiff's vocational rehabilitation expert, Dr. Samuel Bernstein, opened the door to evidence of his disability payments in this manner. In discussing, his recommendations for plaintiff's vocational retraining or rehabilitation, he testified that he felt plaintiff "was well motivated." He believed that plaintiff "wanted to do something with his life. He's interested in working." *Giddens I*, 937 S.W.2d at 304, App. 7. In *Giddens I*, the Court of Appeals held this

testimony did not inject plaintiff's financial status into the case, or suggest financial distress, and did not open the door to admission of disability payments. This testimony on its face refers to plaintiff's psychological motive for wanting to work, for wanting "to do something with his life," not to motivation based upon dire financial distress. *Giddens I* held that the trial court had properly excluded the evidence at trial in the first instance, and that it had erred in later granting a new trial based on the exclusion of the evidence of the disability payments. The Missouri Supreme Court held this was the law of the case. The basis for this result is clearly a determination that on this record, and under *Eichel*, the probative effect of the evidence of disability payments was outweighed by its prejudicial effect in this case. *Giddens I* was explicit in recognizing this was the key to analysis under *Eichel*, stating that: "*Eichel* instructs that the relevancy of the evidence is not the key issue but rather that it is the balancing of unduly prejudicial evidence against its probative value."*Giddens I*, 937 S.W.2d at 304, App. 6. It is apparent this is the same basic principle contained in Rule 403 of the Federal Rules of Evidence.

Because this is the same standard KCS asks this Court to grant certiorari to apply, this case simply does not present the issue of whether such a Rule 403 type approach should be applied to evidence of Railroad Retirement disability payments, in preference to a rule of *per se* exclusion. In reality, KCS is asking this Court to reweigh probative value against prejudicial effect on the facts of this case because it disagrees with the way the Missouri courts performed this task.

KCS misrepresents and distorts the evidence in this case in its effort to induce this Court to undertake this task. KCS represents to this Court that in October 1992,

plaintiff "advised that he was no longer physically able to do the job he had done in the past for the railroad." Petition at 5. It asserts this occurred because plaintiff realized that he had enough service at that point that he could stop working and qualify for Railroad Retirement occupational disability with his accrued vacation time. There is no evidence of any kind to support the latter claim. And the first is completely contrary to the record. The evidence at trial was that it was KCS that determined that plaintiff would not be allowed to return to work in October 1992, after it required him to be field tested for his ability to do his job. The claim KCS makes to this Court, that plaintiff "manipulated" the system to qualify for Railroad Retirement occupational disability, rests on these and other factually inaccurate statements in the Petition.

Plaintiff was a foreman for KCS. KCS requires its foremen to be working foremen. They must be able to perform the same heavy manual labor as the men they supervise. Plaintiff's left hand was crushed when a chain holding up a section of railroad track and a tie broke, pinning his hand between the rail and another tie his hand had been placed upon. The full weight of the rail was on top of his hand for several minutes until it could be freed.

After receiving emergency treatment, plaintiff was referred by KCS to Dr. Ramey for treatment. Dr. Ramey was his primary treating doctor. Plaintiff had the first of eight surgeries on his hand at the end of May 1989. He had further hand surgery in September 1989 and February 1990. Dr. Ramey released him to return to work at KCS in May 1990, and he resumed work in June 1990, after being examined and cleared by the KCS company doctor. Clearance by the KCS company doctor was

required by company procedure before he could return to work. He worked until December 1990, when he took some vacation prior to further surgery in January 1991. He resumed work for KCS in May 1991 after again being cleared by the company doctor. He was able to do his job but had to have the men help him out. He continued until shortly before he had another surgery with Dr. Ramey in January 1992. Dr. Ramey then cleared him to return to work with some restrictions.

But when the company doctor then examined him in February 1992, the company doctor refused to clear him to return to work, noting he was not physically qualified to perform essential job duties, and that he was a "definite safety risk" when it came to lifting heavy objects and performing fine movement with the left hand. He then had additional surgery in April 1992, and also had an infection that required him to be hospitalized. He had another surgery in July 1992.

In late summer 1992, Dr. Ramey released plaintiff to return to work with the same restrictions as to lifting with his left hand, and use of vibrating tools and sledge hammers that he had as of January 1992. KCS did not then have plaintiff re-examined by a company doctor to clear him for return to work, but nevertheless ordered him to report for a field test, to evaluate his ability to perform his duties. Under KCS procedures, once plaintiff had been released by his doctor and cleared for duty by the company doctor, KCS was entitled to require plaintiff to pass such a test before returning him to service. When plaintiff was unable to successfully complete the field test, KCS refused to let plaintiff return to service. Plaintiff was taken off the payroll on October 31, 1992 and was not offered another position. This sequence of events was

described and reviewed in part by the Court of Appeals in *Giddens I.* 937 S.W.2d at 302, App. 2-3.

Plaintiff has now had eight surgeries, had three hundred and twenty stitches in his left hand and had eight pins inserted in his fingers. The uncontroverted medical testimony of Dr. Ramey and Dr. Romero indicated that Plaintiff had a significant impairment of his left hand and left upper extremity. Plaintiff cannot make a fist with his left hand. Plaintiff cannot open his left hand flat.

Plaintiff was 44 years of age at the time of trial, and has only a 12th grade education. Prior to his injury in May, 1989, he had worked for the railroad since April 3, 1973, ever since he was 19 years of age. Dr. Samuel Bernstein, a rehabilitation specialist, testified that plaintiff would be unable to do heavy work, or work requiring grasping or climbing. He will be restricted to light and sedentary work, and most such jobs require the use of two hands. The jobs he will able to do will be minimum wage jobs, and, even if he finds such employment, he will suffer periods of unemployment. Plaintiff has been medically disqualified from returning to work for KCS by KCS's own physicians because he would be a definite safety risk when it comes to lifting heavy objects and performing fine motor movements with his left hand. As of the time of trial, plaintiff had unsuccessfully submitted more than 60 applications for employment.

It is apparent that plaintiff's time off work was necessitated by his injuries and multiple surgeries. He returned to work whenever his treating doctor, who had been selected by KCS, and the KCS company physician cleared him to do so. His injuries were real and substantial. They were not feigned. Plaintiff made no announcement in October 1992 that he could no longer physically do the job he had done in the past. That determination was

made by KCS after the field test. And plaintiff did not consult an attorney until he was taken off the payroll on October 31, 1992. The timing of when all this occurred was dictated by the scheduling of his surgeries, the opinions of his treating doctor and the company doctor, and the timing of KCS's decision to field test him and remove him from the payroll. There is certainly no support in the record for the claim that plaintiff could control any of this in order to "manipulate" the system.

In this regard, *McGrath v. Consolidated Rail Corporation*, 136 F.3d 838 (1st Cir. 1998), the primary case upon which KCS relies, is factually distinguishable. In *McGrath*, the railroad alleged plaintiff was feigning physical disability to avoid work and continue receiving disability payments. In this case, there can be no possible claim that plaintiff feigned his injuries. And in this case, KCS's own company doctor has disqualified plaintiff from performing the duties of his railroad job. It is also questionable whether *McGrath* gave due attention to *Eichel's* guidance in weighing probative value against prejudicial effect under Rule 403. In this regard, it is interesting to note that to date no subsequent decision has followed *McGrath* on this point.

The Missouri courts below applied the same standard KCS urges this Court to adopt, that of weighing the probative value of evidence of disability payments against its prejudicial effect. There has been no showing that the Missouri courts below applied this standard improperly in determining that such evidence was properly excluded in this case. The writ should be denied.

II.

This Court Is Without Jurisdiction Of KCS's Due Process And Equal Protection Claims Because The Judgment As To Those Issues Rests Upon An Independent And Adequate State Ground Of Decision. The Due Process Claim Is Also Without Merit As A Matter Of Substance. KCS's Equal Protection And Supremacy Clause Claims Are Without Merit Because The Missouri Instruction And Verdict Form Requiring That The Jury, Rather Than The Judge, Reduce Damages For Contributory Negligence In An FELA Case, Conforms To The Explicit Directive Of The Plain Language Of The Controlling Federal Statute, 45 U.S.C. § 53, Stating That The Damages "Shall Be Diminished By The Jury."

KCS claims the damage instruction used in this case to instruct the jury to reduce damages in proportion to the contributory negligence attributed to plaintiff, if any, and the verdict form, violated the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. This Court is without jurisdiction of that claim because KCS failed to object the damage instruction and verdict form given by the trial court on due process grounds at trial. Nor did it object to the refusal of its proffered damage instruction and verdict form on due process grounds at trial. The Missouri Supreme Court declined to address the merits of the due process claim for that reason. 29 S.W.3d at 823; Petition at 16a. This constitutes an independent and adequate state ground of decision that bars review in this Court.

Rule 73.03 of the Missouri Rules of Civil Procedure provides in part that:

> Counsel shall make specific objections to instructions considered erroneous. No party may assign as error the giving or failure to give

> instructions unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

The requirement of "stating distinctly the matter objected to and the grounds of the objection" is the same as that set forth in Rule 51 of the Federal Rules of Civil Procedure.

At trial, during the instruction conference, KCS objected to the verdict directing instruction "because we believe MAI unconstitutionally discriminates against railroads by instructing in FELA cases differently than in other similar comparative fault cases." (T. 566). No specific provisions of either the Missouri or United States constitutions were specifically mentioned. No specific reference was made to Due Process, Equal Protection, or the Supremacy Clauses of the U.S. Constitution. *See Webb v. Webb*, 451 U.S. 493, 501 (1981) (to confer jurisdiction on this Court at a minimum there should be no doubt that a *federal* claim was presented in state court and that state court was "apprised of the nature and substance of the federal claim at the time and in the manner required by state law"); *Bankers Life and Casualty Co.*, 486 U.S. 71 (1988) (claim that punitive damage award "was clearly excessive, not reasonably related to any legitimate purpose, constitutes excessive fine, and violates constitutional principles" insufficient to support consideration of Contract Clause, Due Process or Eighth Amendment claims in this Court).

The only objection made at trial by KCS to the damage instruction, based on Missouri Approved Instructions (MAI), MAI 8.02, was as follows:

> Mr. Ray: The only objection defendant would have would be that we think it ought to

be modified as per other comparative fault cases.

The Court: In other words, to follow the chapter 37 format?

Mr. Ray: Right. (T. 569)

The only objection to the verdict form was:

Mr. Ray: Yes, Your Honor. Once again, we believe it ought to follow the pattern instructions set out in chapter 37 of MAI, as done in other comparative fault cases. (T. 570).

These objections in no way referred to the concept of due process. They certainly gave the trial court no intimation of the argument KCS advanced on appeal, and now makes in this Court: that the damage instruction and verdict form violated KCS's due process rights under the Fifth and Fourteenth Amendments on the ground they deny meaningful appellate review of the jury's determination of contributory negligence and damages. As the Missouri Supreme Court noted, in refusing to reach the merits of the due process argument on appeal because it had not been preserved, under Missouri law:

> Where an alleged error on appeal relating to an instruction differs from the objections made to the trial court, the error may not be reviewed on appeal.

29 S.W.3d at 823; Petition at 16a. Rule 51 of the Federal Rules of Civil Procedure also requires that "[t]he grounds of the objection must be specifically stated, and the error claimed on appeal must be based on the same grounds stated in the objection." *Starks v. Rent-A-Center*, 58 F.3d 358, 361 (8th Cir. 1995). Rule 73.03 of the Missouri Rules of Civil Procedure, like Rule 51 in the federal system,

serves a legitimate state interest in the proper and orderly presentation of objections to instructions.[1]

Thus, the Missouri Supreme Court's rejection of KCS's federal constitutional due process argument rests upon an independent and adequate state ground of decision, and this Court is without jurisdiction to review the due process arguments KCS raises in its Petition. *E.g., Herb v. Pitcairn*, 324 U.S. 117 (1945); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Herndon v. Georgia*, 295 U.S. 441 (1935); *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157 (1917); *Eustis v. Bolles*, 150 U.S. 361 (1893); *Murdock v. City of Memphis*, 20 Wall. (U.S.) 590 (1875). The adequacy and independence of the state ground is evident from the face of the opinion of the Missouri Supreme Court, and fully meets the test of *Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

Further, there is no merit to KCS's due process argument. In effect, KCS argues that when there are disputes as to factual issues the jury must resolve to reach its damage award, a general verdict violates due process as a matter of federal constitutional law. KCS cites no case holding that general verdict in an FELA case involving claims of contributory negligence violates due process. Nor does KCS cite any case outside the FELA area holding that a general verdict in a case with factual disputes relating to damages violates due process as a matter of federal constitutional law. It cites no case holding a general verdict violates due process because a general verdict does not allow the court to check to see whether the jury

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[1] Prior to the effective date of the present Rule 70.03, in 1994, Missouri practice allowed a party to raise its specific objections to instructions for the first time in its motion for new trial, a provision that encouraged counsel to engage in "sandbagging" of possible claims of instructional error at trial.

really followed the court's instructions, or because a general verdict does not include specific findings about specific factual issues, to aid to review of whether the damage award is against the weight of the evidence. Indeed, such a holding would appear to be an extraordinary and unprecedented assertion of federal authority over state practice, because KCS's argument would logically require such a holding to apply to general verdicts in causes of action arising under state law, as well as those arising under federal law. Nor does KCS cite any historical practice in support of its federal due process claim. *See Griffin v. United States*, 502 U.S. 46, 51 (1991); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 276-277 (1856). KCS's due process claims are without merit.

The Missouri Supreme Court appears to have accepted that KCS's trial objection of unconstitutional discrimination, as outlined above, was sufficient to invoke equal protection principles. However, it also determined that the manner in which KCS presented its equal protection claim on appeal was insufficient to preserve the issue under Missouri law. The argument portion of KCS's brief on appeal did not cite any equal protection decision of this Court or any other court in support of its argument. It did not make any reference to the standards or tests used to apply the Equal Protection Clause of the Fourteenth Amendment, much less explicitly apply the applicable standards to explain how the damage instruction and verdict form are claimed to violate equal protection. Under well established Missouri practice, the failure to cite relevant authority in the argument in support of a point relied on, or to offer an explanation as to why such authority is unavailable, is deemed an abandonment of the argument. *E.g., Martin v. McNeill*, 957 S.W.2d 360, 365, 366 (Mo.App.1997); *Shiyr v. Pinckney*, 896 S.W.2d 69, 71

(Mo.App.1995). The Missouri Supreme Court rejected KCS's equal protection argument on this ground, 29 S.W.3d at 823-24; Petition at 16a-17a. This, too, is an independent and adequate state ground that bars review in this Court.

KCS's failure to cite or discuss any authority under the Equal Protection Clause of the Fourteenth Amendment is not surprising, because such a discussion would have immediately revealed that its equal protection claim is completely without merit.

This case does not involve any suspect classification or fundamental right. There is no basis here for invoking strict or intermediate level scrutiny in this case. There is no basis for any heightened level of scrutiny at all. Instead, the test of equal protection is whether the Missouri FELA damage instruction and the verdict form in this case fail to rationally further a legitimate state interest. *E.g., Burlington Northern Railroad Co. v. Ford*, 504 U.S. 648, 651 (1992). If they may be understood to rationally further a legitimate interest, the equal protection claim must fail. *Id.*

The rationale for the MAI FELA damage instructions and verdict form, as set forth in the Committee Comment, easily meets this test, because the instruction, MAI 8.02, is designed to conform to the explicit text of the FELA itself. 45 U.S.C. § 53, specifically states that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

The Committee Comments (1996 revision) to MAI 8.02, Missouri Approved Instructions, Civil (5th ed. 1996) (MAI), at 103 explain that:

> The submission of comparative fault in an F.E.L.A. case differs from the method in Chapter 37.00 for use in cases based on Missouri law. F.E.L.A. cases are governed by federal law. Under 45 U.S.C. § 53, the *jury* diminishes damages in proportion to the employee's negligence. Under Chapter 37.00, the jury determines the total damages and plaintiff's percentage of fault but the *judge* makes the actual computation diminishing total damages to the amount recoverable by plaintiff.

(emphasis in original). MAI 8.02 and the MAI verdict forms for FELA cases provide for the jury rather than the judge to reduce the damages of the plaintiff in proportion to the plaintiff's contributory negligence because the explicit text of the statute states that this is a jury function in an FELA case.

By contrast, negligence cases under Missouri substantive law are governed by comparative fault provisions of the Uniform Comparative Fault Act (UCFA). *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. banc 1983) (judicially adopting UFCA, and abolishing contributory negligence as a complete defense). Section 2 (a) of the UCFA specifically requires the *jury* to make findings as to the total amount of damages if contributory fault is disregarded, and the percentage of fault to be allocated to each party. Section 2 (c) of the UCFA then specifically requires the *court* to reduce the award of damages based on the findings made by the jury. *See* 661 S.W.2d at 38-39. The damage instructions and verdict forms in Chapter 37.00 of MAI are based on these explicit requirements.

The damage instruction and verdict form KCS submitted to trial court were based on Chapter 37.00 of MAI, and specifically directed the jury not to reduce the damages in proportion to contributory negligence. The damage instruction submitted by KCS and refused by the trial

court thus stated in part (Defendant's Instruction CC, Petition Appendix G, Petition at 37a) (emphasis supplied):

> In determining plaintiff's damages you must not reduce such damages by any percentage of fault you may assess to plaintiff. *The judge will compute plaintiff's recovery by reducing the amount you find as plaintiff's total damages by any percentage of fault you assess to plaintiff.*

Similarly, the verdict form submitted by KCS and refused by the trial court (Defendant's Instruction EE, Petition Appendix H, Petition at 38a) (emphasis supplied) provided that:

> The *judge* will reduce the total amount of plaintiff's damages by and percentage of fault you assess to plaintiff.

As noted above, such a submission conflicts with the plain language of 45 U.S.C. § 53, which provides "the damages shall be diminished *by the jury* in proportion to the amount of negligence attributable to such employee." (emphasis supplied).

KCS represents to the Court that no other state or federal jurisdiction provides for the *jury* to make the reduction in damages proportionate to plaintiff's contributory negligence and return a verdict for plaintiff's net damages in an FELA case, as Missouri does. That representation is not accurate. Although the Eighth Circuit model civil instructions adopt the approach suggested by KCS, the Committee Comments specifically provide that the district court may properly choose instead to instruct in the same way as was done in this case (the jury is instructed to reduce the damages and render a net award), and recognizes that this method is supported by the explicit plain language of 45 U.S.C. § 53. See Manual of Model Civil Jury Instructions for the District Courts of

the Eighth Circuit, Committee Comments to Instruction 7.08, p. 243-44 (1999). In this regard, the Committee stated (emphasis and ellipsis in original):

> In cases in which the issue of contributory negligence has been submitted to the jury, and the jury has been instructed to make findings on the issues of contributory negligence and damages, there is a question whether the jury or the court should perform the computations which reduce the total damages by the percentage of contributory negligence found. The plain language of 45 USC § 53 (1908) is that "the damages shall be diminished *by the jury . . .* " (emphasis added.) This Committee is not aware of any case specifically prohibiting a form of verdict which allows the jury to determine the percentage of plaintiff's negligence and permits the court to perform the mathematical calculation. State jurisdictions such as Arkansas and Missouri, and some federal courts, instruct the jury to reduce the total damages awarded by the percentage of contributory negligence before rendering a general verdict for the reduced amount of total damages. *Wilson v. Burlington Northern, Inc.*, 670 F.2d 780, 782-83 n. 1 (8th Cir.), *cert. denied*, 457 U.S. 1120 (1982) (jury instructed to perform contributory negligence reduction computation and to return general verdict for damage award in reduced amount); *note* 3 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil §§ 94.18 & 94.21 (4th ed. 1987).

As the Committee Comment notes, Devitt, Blackmar & Wolff, FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil §§ 94.18 & 94.21 (4th ed. 1987), provides for the jury in an FELA case to reduce the damages in proportion to contributory negligence and render a net verdict. See also 9th Cir. Civ. Jury INSTR. 8.2.6 (1997) (jury

instructed to reduce the damages for contributory negligence, if any, in FELA cases).

Of the authorities cited by KCS in support of its representation to this Court that no other state or federal jurisdiction provides for the jury to reduce the damages in an FELA case and render a net verdict (Petition at 26), several simply do not support KCS's claim in any way. For instance, in *Janke v. Duluth & Northeastern Railroad Co.*, 489 N.W.2d 545 (Minn.App.1992), the trial court gave a damage instruction telling the *jury* to reduce plaintiff's damages in proportion to plaintiff's contributory negligence, based upon the language of 45 U.S.C. § 53. The trial court also gave the jury a special verdict form calling for a finding of total damages, and an apportionment of fault between plaintiff and defendant. The special verdict form told the jury to ignore contributory negligence in assessing damages. The judgment was reversed and remanded for a new trial on damages because the damage instruction and special verdict form were in conflict. In *St. Louis Southwestern Railway Co. v. Grider*, 900 S.W.2d 530 (Ark. 1995), plaintiff's contributory negligence was not even an issue. At most, that opinion reflected in passing how fault was apportioned between a defendant railroad in an FELA case and a third party tortfeasor joined in the case based upon state law negligence, a point that was not at issue on appeal. It did not address in any way the manner in which damages are to be reduced in an FELA case based on contributory negligence or whether the jury or the judge is to perform the reduction. On this point, *see* Arkansas Model Jury Instructions, Civil (AMI Civil 3d) 1904 and 1913 at pp. 205 and 215 (in FELA case, the jury reduces the damages and arrives at the net damages after reduction for contributory negligence).

In other cases cited by KCS, the jury found a percentage of contributory negligence but it cannot be determined from the opinion whether the jury rendered a net verdict or whether the judge reduced the damages, or it appears that jury reduced the damages and rendered a net verdict. *E.g., Topping v. CSX Transportation*, 1 F.3d 260 (4th Cir. 1993); *Wilson v. Burlington Northern Railroad Co.*, 804 F.2d 907 (10th Cir. 1986); *O'Ryan v. CSX Transportation, Inc.*, 626 N.E.2d 374 (Ill.App.1993). The issue of how the damages were to be reduced for contributory negligence was not at issue in these cases. In fact, under Illinois Pattern Instructions, the jury, and not the judge, reduces the damages in proportion to the percentage of contributory negligence attributed to plaintiff and renders a net verdict in FELA cases. IPI (Civil) 1995, 160.13. KCS cites a case from Kansas, but it appears from Pattern Instructions, Kansas, Civil 3d (PIK-Civil 3d) 132.31, that in Kansas the jury, and not the judge, reduces the damages and determines the final net damage award.

Based upon the foregoing, it is evident that it cannot be demonstrated that MAI lacks a rational basis for its differing handling of reduction of damages for contributory negligence in FELA case and reduction of damages based upon comparative fault in common law negligence cases under state law. *Burlington Northern Railroad Co. v. Ford*, 504 U.S. 648, 651 (1992). The rational basis is apparent: it is the plain language of 45 U.S.C. § 53, which differs on this point from the directives of the UCFA. KCS's equal protection argument is completely without merit.

KCS's Supremacy Clause argument must fail for the same reason. When a federal cause of action, such as an FELA case, is tried in a state court, federal law as to matters of substance controls over state procedural rules.

See St. Louis Southwestern Ry. v. Dickerson, 470 U.S. 410, 411 (1985). If the generally applied state rule is not consistent with the applicable federal law as to a matter of substance, the court must treat the federal cause of action differently than the state cause of action, by applying federal law. The Missouri Supreme Court recognizes and abides by this principle. *See, e.g., Kauzlarich v. Atchison, Topeka and Sante Fe Railway Co.*, 910 S.W.2d 254, 257-258 (Mo. banc 1995). The decisions of this Court make it clear that the division between the respective functions, roles and authority of the jury and the judge in FELA cases is a matter of substance controlled by federal law. *See, e.g., Rogers v. Missouri Pacific Railway Co.*, 352 U.S. 500 (1957). When an FELA claim is tried in state court, the provisions of 45 U.S.C § 53 mandate that contributory negligence does not bar a recovery, but that "damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." When MAI provides that *jury*, rather than the judge, diminishes the damages, it thus conforms to the plain meaning of explicit directive in the text of the controlling federal statute that creates the cause of action. This does not violate the Supremacy Clause. To the contrary, MAI 8.02's conformity to plain language of 45 U.S.C. § 53, in providing that the reduction in damages based upon contributory negligence will be made "by the jury," illustrates its fidelity to the principles of the Supremacy Clause.

The writ should be denied.

CONCLUSION

This case is not one appropriate for review by this Court. As explained above, this Court is without jurisdiction of a number of the issues Petitioner KCS seeks to

present. In addition to these jurisdictional issues, the judgment of the Missouri Supreme Court is entirely in accord with the applicable federal statutory and constitutional law. Nothing has been shown to warrant review in this Court. For all of the foregoing reasons, it is most respectfully submitted and urged that the Petition for Writ of Certiorari to the Missouri Supreme Court be denied.

Respectfully submitted,

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937 S.W.2d 300

Missouri Court of Appeals,
Western District.

Gary [sic] V. GIDDENS, Appellant,
v.
KANSAS CITY SOUTHERN
RAILWAY COMPANY, Respondent.

No. WD 51568.
Nov. 26, 1996.
Motion for Rehearing and/or Transfer to
Supreme Court Denied Jan. 28, 1997.

Application to Transfer Denied
Feb. 25, 1997.

Patrick O'Brien, St. Louis, for appellant.

Harland Burkhead, Kansas City, for respondent.

HANNA, Presiding Judge.

Plaintiff, Garry V. Giddens, brought this cause of action, premised upon the Federal Employer's Liability Act, *45 U.S.C. § 51 et seq.*, for injuries he sustained on May 18, 1989, while working for the defendant as a maintenance-of-way foreman. He appeals from the Circuit Court's order granting defendant Kansas City Southern Railway Company's Motion for New Trial.

On May 17, 1989, the plaintiff was dispatched to check a railroad track for water damage due to heavy rains, which had washed away the roadbed. On May 18, 1989, he was again called to assess further damage along the right of way. On May 19, 1989, the plaintiff was instructed to take his crew to milepost 612 to repair the washout by building a box bridge structure under the rails to hold them up. He was told to use the crane and

caboose chains to lift the rails while the box bridge was being built.

Upon arriving at milepost 612, the plaintiff was instructed to supervise a backhoe operator and to place the washed out mud and rock back into the washout. The plaintiff and the crew were then to use the locomotive crane to raise the tracks and place ties on top of the mud and rock to support the track.

While repairing the tracks, the plaintiff was under a raised rail assisting in placing ties to shim up the rail. Because of the slope of the fill material, the plaintiff had to prop himself up with his left hand while he guided the ties in with his right hand. While the rails and ties were in mid-air, the chain broke and they fell on the plaintiff's left hand. It took approximately six minutes to remove the track and ties from the plaintiff's hand.

The plaintiff sought emergency treatment and spent the weekend in the hospital. The following Monday, the plaintiff went to see a physician, selected by the defendant, who specialized in the treatment of hands. Between 1989 and 1992, the plaintiff underwent seven surgical procedures, primarily on the long and ring fingers, to restore function to his left hand.

The plaintiff received treatment and did not work from the time of the accident until June 1990. He then worked until December 1990, at which time he took off until May 1991 for further treatment. He then returned to work until December 1991. He did not work for the railroad thereafter.

In February 1992, a company doctor examined the plaintiff for fitness for duty and medically disqualified him from performing his previous job on the railroad. In September 1992, the surgeon who operated on the plaintiff's hand advised the defendant's Division Engineer that the plaintiff was restricted from lifting anything over ten pounds with his left hand and was prohibited from using vibrating tools and sledge hammer.

The defendant had the plaintiff undergo a field test, which he was unable to successfully complete. Plaintiff was taken off the payroll on October 31, 1992, and was not offered another position.

Between the time of the original accident in 1989 and the plaintiff's last absence in October 1992, he received his regular wages under the defendant's wage continuation program, and he continued to accrue credited months towards eligibility for the Railroad Retirement Board disability pension. The first point on appeal concerns the admission of the plaintiff's benefit payments under the Railroad Retirement Act[1].

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[1] The Railroad Retirement Board annuities are funded partially by the employer and partially by the employee. Under Tier Two, the employee pays 4.9 percent on his first $45,000 of earnings and the employer pays 16.1 percent. Contributions to the fund by both parties are mandatory. After 20 years of credited service with the defendant, the employee qualifies for a disability pension. The employee is limited to $400 per month outside earnings; any earnings in excess decrease his $1,500 monthly pension dollar for dollar.

When the case was first tried, the jury returned a verdict of $500,000. The trial court sustained the defendant's motion for new trial on the ground that a mitigation instruction was not given. No appeal was taken. The case was retried, and the jury returned a verdict in the amount of $1,400,000 for the plaintiff. The court sustained the defendant's motion for new trial on two grounds, which now have been briefed on appeal.

Defense counsel sought to introduce evidence of the plaintiff's disability payments. The trial court refused to allow the plaintiff to be questioned about his pension proceeds because it violated *Eichel v. New York Cent. R.R. Co.*, 375 U.S. 253, 84 S.Ct. 316, 11 L.Ed.2d 307 (1963). In the defendant's motion for new trial, defendant challenged the trial court's decision to exclude, from the jury's consideration, the fact that the plaintiff had been receiving, and would continue to receive, disability benefits. The trial court reversed its decision excluding the evidence, believing *Moore v. Missouri Pac. R.R. Co.*, 825 S.W.2d 839 (Mo. banc 1992) to be the controlling case law.

The defendant maintains that the benefits paid by the Railroad Retirement Board were not a "collateral source" payment but were relevant to plaintiff's ability and incentive to work and to his obligation to mitigate damages. Further, the defendant argues that even if the evidence is generally excludable, the plaintiff had "opened the door" to its admission. Specifically, the defendant contends that the plaintiff's vocational rehabilitation expert, Dr. Samuel Bernstein, invited introduction of the evidence when he testified that the plaintiff was well-motivated to work. Plaintiff maintains that the evidence of his benefits was

not admissible under any set of facts because they constituted collateral source evidence.

On a motion for new trial, a trial court may reconsider its rulings on discretionary matters and may order a new trial if the court believes its discretion was not wisely exercised and that the losing party was thereby prejudiced. *State ex rel. Missouri Highway and Transp. Comm'n v. Pedroley*, 873 S.W.2d 949, 953 (Mo.App.1994). While appellate courts are more liberal in upholding the grant of a new trial than in denying it, the error complained of still must be prejudicial to the party seeking the new trial. *VonSande v. VonSande*, 858 S.W.2d 233, 236 (Mo.App.1993). The error complained of here is that the evidence which was excluded would have been used to rebut Dr. Berstein's testimony.

However, the discretion accorded the trial court in granting a motion for new trial presupposes a determination of fact, not law. *Highfill v. Brown*, 340 S.W.2d 656, 664 (Mo.1960). The trial court must not only be dissatisfied with the verdict, but there must be some compelling reason to warrant its dissatisfaction. *Van Loon v. St. Joseph Ry., Light, Heat & Power Co.*, 271 Mo. 209, 195 S.W. 737 (1917). The trial court's discretion may not declare incompetent evidence to be admissible or competent evidence to be inadmissible.

Eichel v. New York Cent. R.R. Co., 375 U.S. 253, 84 S.Ct. 316, 11 L.Ed.2d 307 (1963), is the seminal case on the issue of the admissibility of disability payments. In *Eichel*, the Supreme Court held that evidence of the plaintiff's receipt of disability pension payments under the Railroad

Retirement Act should not have been received into evidence. *Id.*, 375 U.S. at 254-55, 84 S.Ct. at 317. In so finding, the Court stated:

> At the trial, counsel for respondent argued that the pension would show "a motive for [petitioner's] not continuing work, and for his deciding not to continue going back to work after the last accident." On the basis of this argument the Court of Appeals concluded that the disputed evidence should have been admitted because: "Its substantial probative value cannot reasonably be said to be outweighed by the risk that it will . . . create substantial danger of undue prejudice through being considered by the jury for the incompetent purpose of a set-off against lost earnings." We disagree. In our view the likelihood of misuse by the jury clearly outweighs the value of this evidence. Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension.
>
> *Id.* (footnote omitted).

Eichel instructs that the relevancy of the evidence is not the key issue but rather that it is the balancing of unduly prejudicial evidence against its probative value. The court came down on the side of the potential harm that may be caused by the introduction of this evidence outweighing its probative value. The court held it is improper for disability pension benefits to be considered by the jury in assessing mitigation of damages or to show malingering. In *Moore v. Missouri Pac. R.R. Co.*, 825 S.W.2d

839, 842 (Mo. banc 1992), the court acknowledged and followed the principle of *Eichel*.

The defendant maintains that the rule set forth in *Eichel* is not absolute and that Dr. Bernstein's testimony opened the door to rebuttal evidence of the plaintiff's pension benefits. At trial, Dr. Bernstein was asked what recommendations he had for vocational retraining or rehabilitation of the plaintiff. He stated:

> *I felt [the plaintiff] was well motivated.* That's number one. Motivation is not a problem, as I saw it, in this particular case.
>
> * * * * * *
>
> First, he can't go back and do what he did. That's just that. *Secondly, the man wants to do something with his life. He's interested in working.*
>
> * * * * * *
>
> Because I felt that he was *motivated and because he's motivated,* I want to encourage him to go – I told him to look.

The trial court held in its order granting the defendant's motion for new trial that Dr. Bernstein's testimony opened the door to evidence of the disability payments. Specifically, the trial court stated:

> [T]he disability payments create a reason for plaintiff not to secure employment. Plaintiff receives $1500 per month in disability payments. If he earns more than $400 per month the disability payment is correspondingly reduced . . . . Not working for that amount allowed him to create the impression before this jury that he had no income. This no doubt encouraged the jury to award him substantial damages. . . .

Some limited evidence about the disability payments should have been admitted to challenge Dr. Bernstein's comments about motivation.

The plaintiff first argues that a witness for the plaintiff cannot open the door, claiming that only the plaintiff, and he alone, can raise the issue of hardship or financial distress to permit introduction of the evidence of plaintiff's retirement benefits. We have not located any authority that suggests such a requirement. The plaintiff relies primarily on *Moore v. Missouri Pac. R.R. Co.* for this argument. Contrary to his assertion, *Moore* does not restrict the introduction of the rebuttal evidence to those times when the plaintiff himself raises the issue of his dire financial condition. The court in *Moore* observed that "[t]here is no functional distinction between the plaintiff injecting his dire financial condition on direct examination or on cross-examination." *Moore*, 825 S.W.2d at 842. Actually, *Moore* expanded the admissibility of the rebuttal evidence to the situation when the plaintiff opens the door by testifying to his dire financial condition on cross-examination. *Id.* at 842-43. Importantly, the court stated that "it is the raising of plaintiff's financial condition with the jury" that permits the defendant to rebut with evidence of other financial assistance available to the plaintiff, irrespective of whether the evidence is injected purposefully or through inadvertence. *Id.* at 843. The plaintiff therefore cannot circumvent the rule by offering testimony of his financial hardship through an expert instead of by his own testimony. We are not persuaded that only the plaintiff himself may open the door to this rebuttal evidence. The plaintiff invites such evidence if his expert witness testifies to plaintiff's financial distress.

The admission of the disability and retirement benefits is dependent on the direct testimony of plaintiff's adverse financial condition and not upon which witness offers the testimony.

The defendant correctly argues that there are exceptions to the rule set forth in *Eichel*. *Gladden v. P. Henderson & Co.*, 385 F.2d 480, 483-84 (3rd Cir.1967), *cert. denied*, 390 U.S. 1013, 88 S.Ct. 1262, 20 L.Ed.2d 162 (1968), and *Lange v. Missouri Pac. R.R. Co.*, 703 F.2d 322, 324 (8th Cir.1983), both determined that an exception to *Eichel*'s general rule of inadmissibility existed in those situations where the plaintiff injects his financial condition into the lawsuit. In *Gladden*, the plaintiff testified that "my bills got behind and when I went back to work, that was one of the main reasons I went back to work, was to try to catch my bills up and support my family." *Gladden*, 385 F.2d at 482. The court found that the defendant was not required to leave this testimony unchallenged. *Id.* at 483-84. Likewise in *Lange*, the court permitted the defendant to rebut the plaintiff's testimony that he had to return to work immediately after back surgery because he had no savings or disability income with evidence that he had settled a workers' compensation claim for a lump sum payment. *Lange*, 703 F.2d at 323-24.

In *Moore v. Missouri Pac. R.R. Co.*, 825 S.W.2d 839, 842 (Mo. banc 1992), the Missouri Supreme Court relied on *Gladden* and *Lange* in recognizing an exception to *Eichel*"s general rule of inadmissibility. In *Moore*, the plaintiff testified on cross-examination that he could not go back to a therapist because he could not afford it. *Id.* at 842. The court therefore permitted the defendant to challenge

this testimony by inquiring about the plaintiff's collateral source payments. *Id.*

If the plaintiff injects his financial condition into the proceedings and implies financial distress, the defendant may challenge this evidence by showing that the plaintiff had financial assistance available. *Moore*, 825 S.W.2d at 843. Here, Dr. Bernstein testified about the plaintiff's motivation to work. The plaintiff's evidence here was not similar to Moore's testimony that he could not continue his therapy because he could not afford it, *id.* at 842, or an employee claiming he was forced to return to work immediately after surgery because he had no money, *Lange*, 703 F.2d at 323-24, or the employee's testimony that he was behind in his bills and had to go back to work to catch up on his bills and support his family, *Gladden*, 385 F.2d at 482. In these cases, the plaintiff's evidence directly injected the financial situation into the case, thereby allowing the admission of collateral source evidence to challenge it. The plaintiff's evidence here did not suggest financial distress for the purpose of appealing for jury sympathy or to increase the jury's award of damages. See *Mateer v. Union Pac. Sys.*, 873 S.W.2d 239, 245 (Mo.App.1993). In fact, being well motivated to work falls far short of the mark of the requirements of *Moore* that there be evidence of plaintiff's financial state designed to evoke sympathy from the jury. See *Moore*, 825 S.W.2d at 843. The trial court properly excluded the evidence, and its exclusion cannot be a point of error on which to grant a new trial.

The trial court granted the defendant a new trial on the alternative ground that plaintiff's closing argument was improper. The plaintiff raises a number of points in

defense of his closing argument. First, he maintains that the defendant failed to object to the alleged improper arguments as a choice of trial strategy and should not be allowed plain error review. He also contends that the trial court held, in its order granting a new trial, that the jury award was not excessive, thereby negating any basis for the new trial. Finally, he contends that his closing argument consisted of proper comments on the evidence or permissible inferences drawn from the evidence and fair retorts to contentions made by the defendant.

In his motion for new trial, the defendant claimed that plaintiff's closing argument violated Rules 3.3 and 3.4 of the Missouri Rules of Professional Conduct and the trial court's rulings on defendant's pretrial motions in limine, which dealt with the Americans With Disabilities Act and the discharge and accommodations of the plaintiff. The defendant contended that these violations incited the bias and prejudice of the jury as evidenced by the excessive damage award to the plaintiff.

Although the defendant failed to object to the plaintiff's closing argument, the point of error was preserved in its motion for new trial. Following arguments, the trial court ordered a new trial on this alternative point, stating:

> Defendant is also entitled to a new trial due to the closing argument of plaintiff. That argument taken as a whole exceeds the bounds of propriety. It attacks opposing counsel and suggests he has no interest in the truth. It improperly suggests that the plaintiff risked being fired for completing the washout repair in another way. It discusses kicking plaintiff off the railroad to

> create animosity toward the defendant. The argument is designed to inflame the jury. Apparently, it worked. Within one hour the jury returned a 1.4 million dollar verdict without requesting any of the exhibits.

Plaintiff directs our first inquiry to defense counsel's failure to object. Plaintiff properly points out that an objection would have permitted the trial court to take corrective action by its ruling, instructions to counsel or the jury, or both. Further, he contends, an objection and the court's ruling would have allowed him to correct his argument. Plaintiff's argument is not without merit. It points out the significance of timely objections as well as the hazards of plain error review. We are certain that these factors were not lost on the trial court which considered them, among others, when it decided the motion pursuant to the plain error rule. While the plaintiff's contention must be given serious consideration by the trial court, we are presented with another, equally sound proposition of law, which is that each case must be decided on its own facts. The motion for new trial enables the trial court to consider its rulings in a more reflective atmosphere. *Farley v. Johnny Londoff Chevrolet, Inc.*, 673 S.W.2d 800, 804 (Mo.App.1984).

Further, Rule 78.08 permits the trial court to review post trial matters, which affect substantial rights, pursuant to plain error, when the court finds that a manifest injustice or miscarriage of justice has resulted. The review is accomplished by the trial judge, who occupies a far better position than this court to fairly determine the effects of unobjected argument, evidence, or court instructions on the jury's verdict.

There is ample authority for the trial court to grant a new trial because of counsel's improper argument even though there was no objection to the argument. In *Greenwell v. Huffman*, 506 S.W.2d 28, 31 (Mo.App.1974)(citing *Robbins v. Brown-Strauss Corp.*, 363 Mo. 1157, 257 S.W.2d 643 (1953)), the court stated:

> The trial judge was in an excellent position to gauge the effect of the improper and objectionable argument, and, if he deemed the overall effect to have been so prejudicial as to deprive plaintiff of a fair and impartial trial as he undoubtedly did, he had the duty to cause the entry of the new trial order, although no objection had been made to such argument.

Id. at 31 (emphasis in original) (*Robbins*, 257 S.W.2d at 648). See also *Beer v. Martel*, 332 Mo. 53, 55 S.W.2d 482, 484 (1932). Our case law holds that, not only does the trial court have the authority to grant a new trial, it has the duty to do so when the effect of the argument was so prejudicial that a party did not receive a fair trial. This points out a meaningful distinction between the denial and grant of a new trial. "On appeal, when a party claims error because the trial court denied him a new trial, the party ordinarily must have made a proper and timely objection to the claimed error to preserve it for review. . . . " *Farley v. Johnny Londoff Chevrolet, Inc.*, 673 S.W.2d 800, 804 (Mo.App.1984). When a party claims error, as here, because the trial court granted the opposing party a new trial, the opposing party need not have made an objection to the error upon which the trial court granted a new trial. *Id.* We defer to the trial court's discretion granted in Rule 78.08 to review for plain error affecting substantial rights.

Next, the plaintiff contends that the trial court held the verdict not to be excessive and this showed that the jury was not moved by bias, passion or prejudice. The plaintiff asserts that the trial court's express finding that the jury verdict of $1.4 million was not excessive is inconsistent with a finding of prejudice. In support of his argument, the plaintiff cites to both a passage in the trial court's order granting the defendant's motion for new trial, wherein the court acknowledged that the plaintiff was severely injured, and the court's cover letter accompanying the order, wherein the court stated that there was no doubt that a jury would return a substantial verdict each time the case was tried.

A trial court's ruling on a motion for a new trial is not required to set forth its reasons for the conclusion reached or the mental process by which the determination was made, *Resco Constr. Co. v. Dawson Cabinet Co.*, 656 S.W.2d 324, 326-27 (Mo.App.1983), and in those cases when it does, its efforts should be considered as no more than an attempt to explain the order to the parties and their attorneys. Even in those cases where the court's reasons or observations may appear inconsistent with its ruling, the decision is conclusively presumed to have been made on the ground stated in the order. *Id.*

In *Bierman v. Langston*, 304 S.W.2d 865, 867 (Mo.1957), the order granting a new trial because of an excessive verdict was unambiguous, but the memorandum accompanying the order stated a legal and non-discretionary ground. The two reasons were at variance with each other. The court held that the order allowing a new trial was the only official repository for the court's grounds or for reasons for sustaining a motion for new trial, and that,

in those situations where the order is unambiguous and the memorandum countervails or disputes the order, the memorandum does not constitute a substitute for the order. *Id.*

An observation that plaintiff was severely injured and that a jury will return a substantial verdict in another trial are not necessarily inconsistent with a ruling that the verdict is excessive. These remarks explained to the parties and their attorneys that a jury verdict less than $1,400,000 would still be substantial for the injuries that the plaintiff sustained. A trial court's explanation for its ruling is a practice which should not be discouraged. However, the trial court's comments, obviously designed to provide an explanation, cannot be used to misconstrue its order.

However, whether the verdict was excessive is not necessarily a controlling factor in determining whether the closing argument was prejudicial. In *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 16-17 (Mo. banc 1994), the trial court allowed plaintiff to argue a specific dollar figure for damages for the first time in the final portion of his closing argument although no damage figure was mentioned in the initial part of his argument. Judge Thomas, writing for a majority of the court, overruled prior case law that held that the error was prejudicial only if the damages were excessive. *Id.* at 21-22. The court noted that the verdict of $2,850,000.00, even considering the plaintiff's serious injuries, was very substantial and that it was more reasonable to assume that the improper argument contributed to an increase in the damages rather than to assume the contrary, even though the increased verdict may not be excessive. *Id.* at 22. However, it is usually

impossible to determine whether or how much such an erroneous argument may have contributed to the verdict. *Id.* at 21. The court adopted the rule derived from *Lester v. Sayles,* 850 S.W.2d 858 (Mo. banc 1993), "that the party responsible for error relating to argument on the issue of damages is charged with a rebuttable presumption that the error was prejudicial." *Id.* at 22. The holding places upon the party who committed the error the responsibility for rebutting the error's prejudicial effect, irrespective of the size of the verdict.

The plaintiff's final position is that there was no impropriety in his closing arguments. The plaintiff argues that his closing argument was based upon permissible inferences reasonably drawn from the evidence and was a fair retort to arguments asserted by the defendant. In evaluating the plaintiff's claims, we are cognizant of the fact that the trial court is in the best position to appraise the consequence of closing argument and that the appellate court may intervene only if it concludes that the trial court abused that discretion. *Hammer v. Waterhouse,* 895 S.W.2d 95, 105 (Mo.App. 1995).

The trial court made its decision based on the overall tenor of plaintiff's closing argument. The court noted examples wherein the plaintiff's counsel attacked opposing counsel by suggesting that he "had no interest in the truth," where he improperly suggested that the plaintiff risked being fired for not repairing the washed out track bed in the way suggested by the defendant, and where he made an unjustifiable argument about the plaintiff's termination with the purpose of creating animosity toward the defendant. The court characterized the plaintiff's argument as designed to inflame the passions of the jury.

The parties argue back and forth on this issue, placing their own spin on their respective positions as to each other's understanding of the argument: why the argument was based on the evidence, whether it was a fair retort, and why it was no more or less than a malicious attack on the defendant or its attorney. The plaintiff casts his argument in neutral terms to suggest that there was no intent to inflame the jury. On the other hand, the defendant maintains that the plaintiff's only purpose was to incite jury passion and bias.

The argument by plaintiff's counsel did make repeated references to opposing counsel, including that: (1) all of the defendant's safety rules which had been marked and placed in evidence were now opposing counsel's rules and that opposing counsel decided they had been violated; and (2) that opposing counsel circumvented the truth when trying to explain away plaintiff's argument. Plaintiff's counsel also made references to the defendant that included: (1) that if an employee got hurt at this company, its defense is that he broke a safety rule, and if he can't work, the company will fire him and the employee should not look to it for compensation; (2) that the company "could care less" about safety; and (3) a personal opinion on the credibility of one of the defendant's witnesses. Plaintiff's counsel then stated the following:

> I think there is a real strong inference here that the railroad wanted to avoid the whole medical question and stage this field test, brought him back, failed him so they could run him right off the railroad. They're tired of paying his wage continuation. They're tired of paying them. If

> we can get rid of this guy who, for 20 years gave us the sweat off his brow and didn't give them a moment's problem. . . . He wasn't good enough for Kansas City Southern anymore. They got rid of him. They didn't accommodate him like people are accommodated on other jobs with disability.

We believe that the trial judge was justified in its determination that plaintiff's closing argument was unwarranted, untrue, and that the contentions noted above were not fair retorts, fair comments on the evidence, or reasonable inferences to be drawn therefrom. These remarks were not on the merits of the case, but rather were an attempt to inject hatred and prejudice against opposing counsel and his client. Reckless assertions by counsel, unwarranted by proof and intended to arouse hatred or prejudice, are condemned as tending to cause a miscarriage of justice. *Critcher v. Rudy Fick, Inc.*, 315 S.W.2d 421, 427 (Mo.1958). A charge against opposing counsel is to be decried. See *Tucker v. Kansas City S. Ry. Co.*, 765 S.W.2d 308, 311 (Mo.App.1988).

We are mindful that counsel is afforded wide latitude to argue the evidence and inferences drawn from the evidence. "[T]he law indulges a liberal attitude toward argument, particularly where the comment complained of is fair retort or responds to prior argument of opposing counsel." *Keith v. Burlington N. R.R. Co.*, 889 S.W.2d 911, 915-16 (Mo.App.1994). However, a vigorous closing argument must be directed to the facts, to the reasonable inferences drawn therefrom, to fair retort to opposing counsel's argument, and to the law as applied to the evidence.

The determination as to whether a new trial is warranted because of jury argument rests within the trial court's sound discretion. *Cook v. Cox*, 478 S.W.2d 678, 682 (Mo.1972). Appellate review of such discretion is limited to a determination of whether there has been an abuse of that discretion. *Id.* Deference is given to the better position of the trial judge to evaluate the prejudicial effect of the overall tenor of the closing argument. The trial judge heard the closing argument here and viewed it in its entirety. The court concluded that the argument's purpose was to inject matters of an inflammatory nature before the jury. The trial court's award of a new trial because of unwarranted and unjustified argument, was not an abuse of discretion.

The defendant has raised other issues, which are moot and we trust will be resolved on retrial.

Order granting a new trial is affirmed.

SMART and EDWIN H. SMITH, JJ., concur.

45 U.S.C. § 53

§ 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.)

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45 U.S.C. § 55

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it

has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

(Apr. 22, 1908, c. 149, § 5, 35 Stat. 66.)